NO. 45011-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

STANLEY AARON GEBAROWSKI, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00988-2

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

The State relies upon its statement of the case as set forth in its initial Response Brief. The State submits this Supplemental Response Brief by a ruling of this Court on March 10, 2014, and only addresses Appellant's Supplemental Argument in his Supplemental Brief in this response. Respondent relies upon all prior arguments made in its initial Response Brief for all other issues.

B. ARGUMENT

GEBAROWSKI RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Gebarowski claims he received ineffective assistance of counsel because his attorney requested the "to convict" jury instruction indicate the language, "a deadly weapon, to wit: a knife." Gebarowski's counsel was not ineffective for requesting this instruction as the instruction was proper. And even if the instruction was not proper, Gebarowski cannot show prejudice from his attorney's actions. Gebarowski's claim of ineffective assistance fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v.*

Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a

defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Gebarowski's defense counsel had a clear trial tactic for asking for the instruction to include the language, "to wit: a knife." Defense counsel attempted to prevent the jury from convicting Gebarowski of Assault in the Second Degree for hitting Mr. Williams in the head with a solid block of wood, hoping instead to rely upon the more arguable evidence that the knife did not cause an injury and therefore was not a deadly weapon as it was used. This is an acceptable trial tactic given the facts of this case and the position in which defense found itself trying to mitigate the damage of what were clearly going to be guilty verdicts.

Further, it is clear from closing argument that it was not part of defense counsel's trial strategy to allege to the jury that the knife was not a deadly weapon. Defense counsel never argued or submitted to the jury that the knife was not a deadly weapon. 2 RP at 407-19. Instead, his strategy was to argue that Gebarowski did not use the knife to assault Mr. Williams or Mr. Dang. 2 RP at 417-18. He attempted to show that Mr. Williams' memory was clearest the night of the incident and that he never indicated a knife made contact with his body and also testified that he did not remember a knife contacting his body, and also that lack of DNA testing of the knife showed it was not used to injure Mr. Williams. 2 RP at 408-09. Defense counsel further pointed out that from very early on in the altercation the knife was possibly dropped by Gebarowski or somehow

dislodged from his hand. 2 RP at 411-12. Establishing to the jury the weapon that the State alleged Gebarowski used to commit his Assault in the Second Degree charges was clearly a trial tactic used by defense counsel to attempt to preclude the jury from finding him guilty on evidence that he used a block of wood to assault the victim. As defense counsel was employing a reasonable trial strategy in his request for the jury instruction, Gebarowski cannot show it was ineffective assistance of counsel.

Gebarowski also cannot show prejudice from his counsel's request to specify the deadly weapon in the "to convict" instruction. Gebarowski has to show that but for his counsel's error in requesting this language, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In order for this to occur, the jury would have had to have taken the language from the instruction as a statement from the court that the knife was a deadly weapon, essentially, taking away from the jury for consideration whether the knife qualified as a "deadly weapon." This did not occur, and based on the prosecutor's arguments, it is clear that whether the knife qualified as a deadly weapon was for the jury to determine. 2 RP at 391-92.

In *State v. Akers*, 88 Wn.App. 891, 946 P.2d 1222 (1997), this Court commented on the issue of including "...deadly weapon, to-wit: a

knife" in a jury instruction. The Court commented that by including this language it did not believe a "judge instructs the jury that the particular knife at issue is a deadly weapon as defined by law...." *Akers*, 88 Wn.App. at 898. From the totality of the circumstances in this case, it is evident the judge in Gebarowski's trial did not instruct the jury that the knife was a deadly weapon; neither counsel's arguments to the jury assumed this, and the instructions as a whole, which separately defined "deadly weapon," made it clear to the jury they had to find that Gebarowski committed the assault by using a "deadly weapon" as it was defined by the instructions. *See* CP 89.

Gebarowski's argument reads the "to convict" instruction in isolation. It is well settled that jury instructions must be read together, as a whole. *State v. Teal*, 117 Wn.App. 831, 837, 73 P.3d 402 (2003) (citing *State v. Haack*, 88 Wn.App. 423, 427, 958 P.2d 1001 (1997), *rev. denied*, 134 Wn.2d 101, 958 P.2d 314 (1998)), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004). When the "to convict" instruction is read together with the definition of the term "deadly weapon," it was clear to the jury that they were responsible for finding whether the knife was used in a manner which made it a deadly weapon, and then whether that deadly weapon was used to assault Mr. Williams. As the instructions properly informed the jury of the law and its duties, the "to convict" instruction was not

erroneous. Gebarowski's defense counsel was not ineffective for requesting the language that he did as it did not prejudice the outcome of the case. Further, it is clear that it was a well-reasoned trial tactic to take away from the jury's consideration the possibility the jury would convict based on Gebarowski's use of a block of wood to strike Mr. Williams about the head. Gebarowski's claim of ineffective assistance of counsel fails.

C. CONCLUSION

Gebarowski's attorney was not ineffective for requesting language in a jury instruction which aided him in arguing his theory of the case. Further, the instructions as a whole properly instructed the jury on the law and their duties. Gebarowski cannot show deficient performance or prejudice by that performance. Gebarowski's claim of ineffective assistance of counsel fails. The trial court should be affirmed.

DATED this 9th day of April, 2014.

Respectfully submitted:
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